to confess judgment, and it is error to require it. And even in proper cases for such confession, it should not be required unconditionally, but the order requiring the confession should provide that the judgment be thereafter dealt with as the court of equity may direct. While courts of equity are invested with discretion as to the terms upon which they will grant injunctions, yet it is a discretion to be exercised on well-established principles of equity and law, and is subject to review by the appellate court.

NOELL v. NOELL.—Decided at Wytheville, July 23, 1896.—*Cardwell*, J. Absent, *Harrison*, J:

1. ACT OF LIMITATIONS—*New promise—Notice.* Although a plaintiff may, without pleading it, rely upon a new promise to repel the bar of the statute of limitations pleaded by the defendant to an action on the original cause of action, provided he gives the notice required by the statute (Code, sec. 2922), evidence of the new promise cannot be received in the absence of such notice.

2. SUMMONS—*Return day—Void process—Sec. 3220 of Code mandatory.* A summons to commence a suit which is made returnable on the day of issue is a void summons, and all records based thereon and proceedings had are likewise void. Sec. 3220 of the Code, which provides that the process shall be issued before the rule day to which it is returnable, but may be executed on or before that day, is mandatory.

3. ELECTION BETWEEN CAUSES OF ACTION—*Limitations.* Where a plaintiff has two causes of action open to him and elects one, and adapts his pleading and proofs thereto, he will be bound by his election and cannot thereafter adopt the other. The act of limitations applicable will be the one appropriate to the cause of action selected.

4. NEW TRIAL—*Verdict against evidence or without evidence.* A trial court should not set aside a verdict as contrary to the law and the evidence, when it appears that the verdict was not plainly against the evidence, or without evidence to support it.

TOWN OF BRIDGEWATER v. ALLEMONG.—Decided at Staunton, September 17, 1896.—*Keith*, P:

1. APPELLATE PRACTICE—*Review—Motion for new trial.* Unless the record shows that a motion was made for a new trial in the court below, was overruled, and the action of the court excepted to, this court will not review the ruling of the trial court in excluding evidence offered, although the ruling was excepted to, and a bill of exception signed and made a part of the record. *Newberry v. Williams*, 89 Va. 298, approved.

DIDIER AND OTHERS v. PATTERSON AND OTHERS.—Decided at Staunton, September 17, 1896. *Riely*, J:

1. ASSIGNMENTS—*Future advances—Absolute assignment may be shown to be a mortgage—Reservation of surplus—Fraud in law and fraud in fact.* A chose in action may be assigned as a security for an existing debt and also for future advances. Although the assignment is absolute and unconditional in its terms, it may be

shown by parol to be a mere security for a debt. If the assignment is made in good faith to secure an existing debt and future advances, the mere fact that the assignor is allowed to check on the assignee, which is a bank, for the surplus after paying the amount for which the assignment was made, will not vitiate the assignment. Taking an absolute assignment as a security for a debt is a mere badge of fraud which may be repelled by evidence showing the *bona fides* of the transaction. For distinction between fraud in law and fraud in fact see opinion.

2. ASSIGNMENTS—*Inconsistent reservations.* If an insolvent debtor makes an assignment of all of his property for the benefit of his creditors, reserving benefits to himself at the expense of his creditors, the assignment will be set aside as fraudulent and void, but this rule has no application to an assignment by a debtor of a part only of his estate, made in good faith for the purpose of raising money or securing existing creditors, reserving the surplus to himself. The law would imply such reservation.

3. ATTACHMENTS—*Non-residents.* One who has dwelt in the State for a year or more, and is still dwelling here, with no intention of leaving, is engaged in constructing public improvements in a city in this State under a contract that will occupy him for an indefinite period, is a registered voter in said city and has done other acts evincing his residence in said city, cannot be said to be a non-resident of the State within the meaning of the attachment laws, although his family live out of the State for the convenient education of his children at special schools.

RUSH'S EX'OR AND OTHERS v. STEELE AND OTHERS.—Decided at Staunton, September 17, 1896.—*Buchanan*, J:

1. TRUSTS AND TRUSTEES—*Loss of funds—Negligence.* The trustee was directed by the court, in a pending suit to lend the trust fund and take as security therefor a deed of trust or mortgage on real estate. He loaned the money as directed, but took as security therefor a confession of judgment, upon which execution issued, but, by the direction of the trustee, the execution was not placed in the hands of the proper officer to be levied, whereby the limitation on the judgment was reduced to ten years. The investment by the trustee was reported to the court and confirmed, and three years after making the investment the trustee was removed, and the general receiver of the court substituted in his stead. The debt was amply secured, but was lost solely by permitting the judgment to become barred by the statute of limitations.

Held: The trustee is not liable for the loss, but the general receiver is. It was the duty of the general receiver to ascertain when the judgment would become barred, and to provide against that contingency, and there is nothing in the facts of this case to exempt him from the performance of that duty.

WILLIAMS v. COMMONWEALTH.—Decided at Staunton, September 24, 1896.—*Keith*, P:

1. CRIMINAL PROCEDURE—*Presence of prisoner—Presumption.* If the record shows that a prisoner was present in court when a motion for a new trial was made, the presumption is that he remained until the court adjourned for the day unless the contrary is made to appear either directly or by necessary implication. When